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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 487.

WALTER FILIPEK,
Petitioner,

against

MOORE-McCORMACK LINES, INC.,
Respondent,

and

EASTERN RIGGING CORP.,
Respondent.

BRIEF OF RESPONDENT MOORE-McCORMACK LINES, INC. IN OPPOSITION TO PETITION FOR CERTIORARI.

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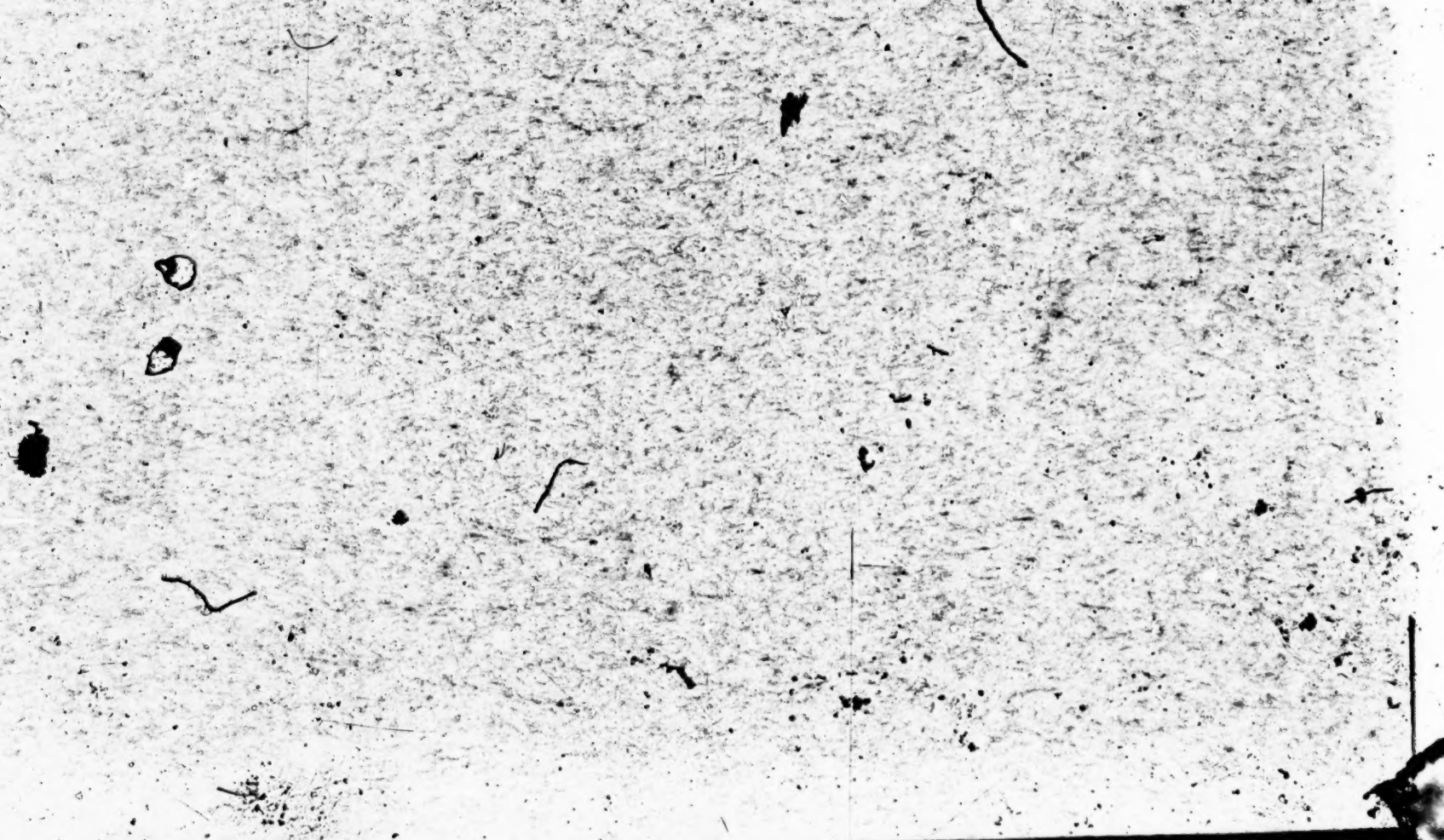

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STATEMENT.

This is a non-statutory negligence action (petitioner's claim of unseaworthiness has been abandoned) based on diversity of citizenship against a shipowner, respondent, Moore-McCormack Lines, Inc. The action is for damages for injuries sustained by the petitioner, a rigging tester's employee, engaged in testing the strength and fitness of the ship's masts, kingposts and booms in a shipyard pursuant to the Canadian Shipping Act. A kingpost at the #1 hatch broke under the testing strain. The petitioner at the time was assisting to rig a boom at the #2 hatch

for testing. At this juncture petitioner and his fellow employees lost control of the boom and its cable struck petitioner.

The judgment of the district court, which also granted a new trial in the alternative pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, dismissed petitioner's complaint, notwithstanding the verdict. The opinion of the United States Court of Appeals for the Second Circuit affirming the judgment, is reported at 258 F. 2d 734 and the opinion of the United States District Court for the Eastern District of New York is reported at 156 F. Sup. 854.

Respondent, Moore-McCormack Lines, Inc., will hereinafter be referred to as "respondent" or "shipowner," since the petition presents no controversy between the petitioner and his impleaded employer, Eastern Rigging Corp., although it is also referred to as a respondent in the title.

The Questions Presented.

The petitioner has abandoned his claim that a shipowner's warranty of seaworthiness extends to him and his sole contention is "that the verdict based on the *theory of negligence* is amply supported and should not have been disturbed" (page 5 of petition, par. 3). However, because the verdict was set aside on the alternative grant of a new trial in the sound discretion of the district court, the petition presents no question for review as to whether the verdict should have been disturbed. Petitioner has never asserted that the district court abused its discretion.

This leaves only the narrow issue concerning the particular rules of common law negligence applicable between the shipowner and an employee of an independent contractor engaged in testing a ship's lifting gear to conform to a Canadian Statute and whether petitioner's evidence

was sufficient to prove a *prima facie* contravention by the respondent of any duty to the petitioner under such common law negligence rules. Clearly, petitioner's claim is not a statutory Federal Employer's Liability Act (45 U. S. C. 51) or Jones Act (46 U. S. C. 688) claim, nor is it a claim by a longshoreman or other person regarded for some purposes as having a standing similar to a crew member as evidenced by the petitioner's abandonment of his warranty of seaworthiness claim. The only claim of negligence in the pre-trial order (726, original record) is "that plaintiff will attempt to prove there was a latent defect in the No. 1 port forward king post with knowledge of which the defendant was chargeable".

Since under the rules of this Court the questions presented for review must be "expressed in the terms and circumstances of the case" it would seem improper for the petitioner to assert abstract questions as to whether the opinion of the Court of Appeals confines or expands doctrines of other Court of Appeals citations; or whether "principles relating to litigants' rights to jury determination of factual issues, as announced in numerous decisions of this Honorable Court" have "been observed by the Court below?", especially when the aforementioned "numerous decisions" are all cases of statutory negligence.

Petitioner's last "question presented" ("Should not certiorari be granted" because of an asserted "growing judicial tendency") is certainly not a question "for review."

In the factual circumstances of this case the narrow questions of common law negligence involved, but which do not merit review by a writ of certiorari may be stated as follows:

1. Whether an employee of an experienced independent contractor performing services under a con-

tract with the shipowner to test the lifting equipment of a vessel for the purpose of determining the ability of its cargo booms and rigging to withstand the strain of working loads in conformance with the Canadian Shipping Act of 1934 has a right of recovery in negligence against the shipowner for personal injuries sustained from being struck by a topping cable when his fellow servants ran from their posts and gave up control of the cable at the sound of the crash of the king post of a boom which failed to withstand the strain of such test because of an alleged latent defect, there being no evidence that the shipowner had any knowledge of the inability of the said king post to withstand the strain of the test and the details of the services being performed were solely under the supervision and direction of the independent contractor's foreman, without any interference by the shipowner.

2. Under these circumstances did the Court properly direct judgment in favor of respondent notwithstanding the verdict.

Reasons for Denying the Writ.

1. The factual pattern of this case is uniquely narrow. It involves only the rigorous testing by an independent contractor of lifting machinery of a vessel pursuant to a foreign statute (Canadian Shipping Act of 1934, Revised Statutes of Canada, 1952, Chapter 29, Sections 471 to 475 Vol. 1) for entry into the Canadian trade and the application of common law negligence rules to an isolated occasion when a claim for injuries sustained by a tester's employee arising from a hazard created by the very nature of the work is made against a shipowner. There is, of course, no conflict of Circuits.

2. The petition does not present any peculiar question of maritime law. It neither arises under the Federal Employers' Liability Act nor the Jones Act. Nor does it involve an injury to a person sometimes regarded as having the status of a crew member.

This court has said that it will not attempt to fashion a "federally defined admiralty rule" for every maritime claim, even though it expressed a specific "national" policy in *Pope & Talbot Inc.* v. *Hawn*, 346 U. S. 406, concerning the effect of contributory negligence on such claims. See *Wilburn Boat Co.* v. *Fireman's Insurance Co.*, 348 U. S. 310, *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282, and *Madruga* v. *Superior Court*, 346 U. S. 556. Thus, general questions of negligence concerning the rights of "business visitors" against shipowners are controlled by general principles of common law negligence or state law. See, for example, *Spaulding* v. *Parry Navigation Co.*, 2 Cir. 187 F. 2d 257 (cert. denied 342 U. S. 918) and *Caldarola* v. *Eckert*, 332 U. S. 155.

3. In the case at bar, the briefs in the Court of Appeals thoroughly discussed the controversial statement as to negligence (based upon Section 344, Vol. 2 of the Restatement of the Law of Torts) contained in another decision of the same circuit, *Halecki* v. *United New York & New Jersey S. H. P. Ass'n*, 2 Cir. 251 F. 2d 708, that a shipowner is required to ascertain the methods and manner in which an independent contractor carries on his activities when "so dangerous a substance as tetrachloride might be used". The Court of Appeals in the case at bar presumably did not see fit to mention it because the facts in that case are materially different from the case at bar. Even under the circumstances of the *Halecki* case the statement lacks authoritative support. As applied to the parties in that case

it appears to be a recital of a legal principle in reverse since it completely overlooks Comment a of Section 344 of Vol. 2 of the Restatement of the Law of Torts which limits the section to "only towards those who come on the land as his *patrons*" (emphasis added). It cannot be reconciled with two other decisions of the same circuit cited in the opinion below. *Gallagher* v. *United States Lines Co.*, 2 Cir. 206 F. 2d 177, cert. denied, 346 U. S. 897, rehearing denied 346 U. S. 940, and *Berti* v. *Compagnie de Navigation Cyprien Fabre*, 2 Cir. 213 F. 2d 397. The statement is also contrary to the leading New York case of *Hess* v. *Bernheimer & Schwartz Brewing Co.*, 219 N. Y. 415.

Although the *Halecki* case has been argued in this court (No. 56 Oct. Term 1958) it would seem that the issues on review do not involve this controversial misapplication of a negligence principle but are apparently limited to an unseaworthiness claim under the New Jersey Wrongful Death statute and to the question of the applicability of the maritime rule of comparative negligence to a state Death Act claim.

It is obvious, as acknowledged by the petitioner and his employer in the record below, that the very work in which the petitioner (as an employee of an independent contractor) was engaged, to wit, the testing of the masts and other booms of the ship by applying pressure, created the hazard that a mast would topple under the sudden stress of the pressure strain, and that the rationale of *Byars* v. *Moore-McCormack Lines*, 2 Cir., 155 F. 2d 587, and *Bruszewski* v. *Isthmian*, 3 Cir., 163 F. 2d 720 cert. den. 333 U. S. 828, was properly applied.

The fundamental rule of common law, made applicable by these cases, to maritime negligence claims, was concisely stated by Mr. Justice Brennan in the New Jersey Supreme Court opinion of *Gibilterra* v. *Rosemawr Homes*, 19 N. J.

166, 115 A. 2d 553, where he said that a "landowner is under no duty to protect an employee of an independent contractor from the very hazard created by the doing of the contract work" and in sustaining a directed dismissal in favor of the owner Justice Brennan also noted that the landowner had not "participated in, actively interfered with, or exercised control of the manner and method by which the work" was done.

4. "The duties which a contractee owes to employees of the independent contractor are less than those owing to third persons"/(57 C. J. S., Section 600, page 372), and it is fundamental, as stated in *C. & O. R. Co.* v. *Mihas*, 280 U. S. 102, 107, that "for there to be a recovery, it is not sufficient that some duty or obligation should have been neglected by the defendants, but it must have been a neglect of some duty or obligation to him who claims damages for the neglect." No breach of any duty owed to the petitioner was proved.

5. An A. B. seaman, formerly employed on the vessel, gave testimony 4½ years after the event that he heard a cracking sound apparently from the direction of the king-post during a noisy event which occurred on September 9, 1952 (more than 2 months before petitioner's accident) when a piece of cable (runner) snapped. *He was no longer in the employ of the defendant on September 9, 1952 when he allegedly heard this sound.*

The Court below said:

> "Indeed, Weber admitted that he did not tell anyone of the incident until he related it to the plaintiff's attorney after the institution of this suit and some four and one-half years after the occurrence. Any knowledge on the part of Weber cannot be imputed to

> the *Mormacsurf* as he was not in Moore-McCormack's employ on September 9, the date of the alleged cracking [sound] of the kingpost. According to Weber's deposition he had left the ship the day before and just returned to pick up his sea chest and pay some debts. His relation to the ship at the time of the alleged cracking [sound] in the kingpost was that of a mere stranger." Admittedly a visual inspection of the kingpost itself would not disclose whether or not any damage had occurred to the kingpost as a result of this incident (p. 18 Appendix to Petition).

Weber did not appear at the trial and his bare deposition did not contain testimony that he actually heard a cracking in the king post. This was a misconception of his testimony evidently derived from petitioner's brief below. The witness said (53, Steno. Min.) "to my estimation at the time the cracking sound was something behind me and above me; in that general vicinity in that position" and "that's as much as I can say about that." Obviously, this belated hazy "estimation" almost five years after the event, created no *post facto* duty to an employee of an independent contractor who was hired for the very purpose of ascertaining the existence of latent defects of which the shipowner concededly had no actual knowledge and this "estimation" could not charge the shipowner with non-existent knowledge under the circumstances.

Neither did the respondent have a retrospective duty to redesign equipment (previously approved by the American Bureau of Shipping) toward a petitioner who was hired to test the existing equipment for its ability to withstand stress, merely because a witness avers a "personal preference" for differently designed equipment.

It is clear that the petitioner and his employer were aware that an incident of the work and a hazard created

by the testing was that a mast could topple and fall under the testing stress (334, 335, 339 Steno. Min., D. Apx 3 A).

6. The criticism by the dissenting judge of the district court's discussion of the evidence was plainly misplaced. So was his criticism of his experienced colleagues' concept of the role in the judicial process of briefs and argument of counsel.

It reveals that he overlooked the double aspect nature of the trial judge's opinion: (1) discussion of the evidence in exercising his sound discretion to grant a new trial in the alternative, and (2) discussion of the failure of the evidence to make out a negligence case. It is fundamental that a trial judge may consider all the aspects of the evidence, including belief in falsity of testimony, when exercising his discretion in granting a new trial. *Aetna Casualty & Surety Co.* v. *Yeatts*, 4 Cir. 122 F. 2d 350. Furthermore, the statement of the dissenter that he would remand "for the reinstatement of the verdict" not only reveals this oversight but indicates that he failed to read the pointed analysis of the alternative new trial procedure contained in respondent's brief below. Obviously, a judge who grants a new trial has "judicially scuttled the verdict" but such name-calling merely suggests the impatience of the dissenter with a procedure in conflict with his preconceptions and furnishes no guide to judicial power.

If the dissenting judge had read the aforementioned analysis in respondent's brief below he would have been reminded of his own corrective action on a petition for rehearing in the case of *Binder* v. *Commercial Travelers Mut. Acc. Ass'n. of America*, 2 Cir., 165 F. 2d 896, when he stated at page 902 that "hence we cannot interfere with the judge's discretionary power in ordering a new trial" and withdrew his previous direction to reinstate the verdict. This, of course, is in accordance with the operation

of the alternative new trial procedure under Rule 50(b) as explained by this Court in *Montgomery-Ward* v. *Duncan*, 311 U. S. 243, at page 254, when it said:

> "Should the trial judge enter judgment n.o.v. and, in the alternative, grant a new trial on any of the grounds assigned therefor, his disposition of the motion for a new trial would not ordinarily be reviewable, and only his action in entering judgment would be ground of appeal. If the judgment were reversed, the case, on remand, would be governed by the trial judge's award of a new trial."

7. Since this is not a case involving statutory negligence under the Jones Act or the Federal Employer's Liability Act the numerous citations mentioned in petitioner's brief are not pertinent. The considerations for review in those cases are not present here. As stated in *Nicholson* v. *Erie Railroad Company*, 2 Cir., 253 F. 2d 939, 940. "The FELA has its own rule of causation." Neither are the two non-statutory citations pertinent. The first involved the maritime rule of comparative negligence and determined the correctness of a charge under that rule, and the other, which has yet to be decided, involves broad considerations concerning the status of a guest of a seaman aboard a ship as a licensee or invitee and whether a warranty of seaworthiness extends to such a guest.

8. In any event this Court in *Rogers* v. *Missouri Pac. R. Co.*, 352 U. S. 500 indicated that its review of a large number of cases arising under the Federal Employer's Liability Act was based upon the conception that an employer is liable for statutory negligence under that Act however slight a role it may have played in producing its employee's injury and that it is the "special features of this statutory negligence action that makes it significantly different from the ordinary common-law negligence action and has required this Court to review a number of cases."

Even the dismissal by directed verdict of a statutory negligence action is not guaranteed a review or reversal. See, for example, *Miller* v. *Farrell Lines*, 2 Cir., 247 F. 2d 503, cert. denied, 355 U. S. 912 and *Herdman* v. *Penn. R. R. Co.*, 352 U. S. 518.

The following statement of this Court in the case of *Layne & Co.* v. *Western Well Works*, 261 U. S. 387, 393 (Cited with approval when it recently dismissed a writ of certiorari as improvidently granted in *Hinkle* v. *New England Mutual Life Insurance Co. of Boston, Massachusetts*, No. 28, October Term, 1958, on November 10, 1958) is pertinent:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit court of appeal. The present case certainly comes under neither head."

Conclusion.

The petition for a writ of certiorari should be denied.

November 24, 1958.

Respectfully submitted,

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